

LAW REVIEW 962

The Officer, December 2009

Don't Chafe the Chaplain

Federal agency tells deployed employee it plans to keep his replacement rather than re-hire him.

1.3.2.4 -- Status of Returning Veteran

Q: I am a civilian chaplain for the U.S. Department of Veterans Affairs (VA) and a chaplain in the Army Reserve. I began my federal civil service career in October 2007, after I graduated from my denomination's seminary. I joined the Army Reserve as a chaplain at almost exactly the same time. I had no prior military service and no federal civilian employment before October 2007.

The Army Reserve called me to active duty and deployed me to Afghanistan, where I am currently serving. My orders are for one year, from Dec. 1, 2008, to Nov. 30, 2009. I expect to apply for reemployment with the VA shortly after I leave active duty.

I have several questions about my rights as a federal employee away from work for military service. First, will I have the right to return to my VA job after I leave active duty?

A: You will have the right to reemployment in your pre-service civilian job, provided you meet the eligibility criteria under the Uniformed Services Employment and Reemployment Rights Act (USERRA):

- You must have left a civilian position of employment for the purpose of performing voluntary or involuntary service in the uniformed services-anything from five hours to five years. 38 U.S.C. 4312(a). It is clear you meet this criterion.
- You must have given the employer prior oral or written notice. 38 U.S.C. 4312(a)(1). For purposes of this article, I will assume you gave such notice.
- Your cumulative period of uniformed service, relating to the employer relationship for which you seek reemployment, must not have exceeded five years. Because your current period of service is involuntary, it does not count toward your five-year limit. 38 U.S.C. 4312(c).
- You must have been released from the period of service without having received a punitive (by court martial) or other-than-honorable discharge. 38 U.S.C. 4304.
- You must have made a timely application for reemployment with the pre-service employer. After a period of more than 180 days of service, you have 90 days to apply for reemployment. 38 U.S.C. 4312(e)(1)(D).

Let us assume you left active duty on Nov. 30, 2009, and applied for reemployment on Dec. 2, 2009. In that case, the VA is required to have you back on the payroll within two weeks after your application, or by Dec. 16, 2009. 20 C.F.R. 1002.181.

If you meet the USERRA eligibility criteria, the VA is required to reemploy you "in the position of employment in which the person would have been employed if the continuous employment of such person with the employer had not been interrupted by such [uniformed] service, or a position of like seniority, *status*, and pay, the duties of which the person is qualified to perform." 38 U.S.C. 4313(a)(2)(A) (emphasis supplied).

I invite the your attention to the Law Review library at www.roa.org/law_review_library. Go to Category 1.3.2.4 in the Subject Index for eight articles about the concept of "status" under USERRA. Location (commuting area) is an aspect of status, and so is daytime versus nighttime work. In your situation, it seems reasonable to conclude that if you had not been called to active duty, you would still be in the position that you left.

Q: Last week, my VA supervisor sent me an e-mail informing me my position has been filled and the new chaplain is doing a fine job, so I will not be rehired upon my return. Does USERRA require the employer to

reemploy me even if that means displacing another employee?

A: Yes. Here's an excerpt from the ruling in the case *Nichols v. Department of Veterans Affairs*, 11 F.3d 160, 163 (Fed. Cir. 1993). Interestingly, Nichols was a VA chaplain. "The department first argues that, in this case, Nichols' former position was 'unavailable' because it was occupied by another, and thus it was within the department's discretion to place Nichols in an equivalent position. This is incorrect. Nichols' former position is not unavailable because it still exists, even if occupied by another. A returning veteran will not be denied his rightful position because the employer will be forced to displace another employee. 'Employers must tailor their workforces to accommodate returning veterans' statutory rights to reemployment. Although such arrangements may produce temporary work dislocations for nonveteran employees, these hardships fall within the contemplation of the Act, which is to be construed liberally to benefit those who 'left private life to serve their country.' *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946).' *Goggin v. Lincoln St. Louis*, 702 F.2d 698, 704 (8th Cir. 1983). Although occupied by Walsh, Nichols' former position is not unavailable and it is irrelevant that the department would be forced to displace Walsh to restore him."

For other cases holding that the lack of a current vacancy does not excuse the employer's failure to reemploy the returning veteran, I invite your attention to *Cole v. Swint*, 961 F.2d 58 (5th Cir. 1992); *Fitz v. Board of Education of the Port Huron Area Schools*, 662 F. Supp. 10 (E.D. Mich. 1985); and *Green v. Oktibbeha County Hospital*, 526 F. Supp. 49 (N.D. Miss. 1981). There are circumstances in which the employer must lay off the replacement in order to reemploy the returning veteran. I think your situation is such a case.

I invite your attention to Law Review 0829 (June 2008), titled "USERRA Overrides the Interests of the Replacement Employee." Also, you should ask your supervisor to read Law Review 134 (Sept. 2004), titled "Employers-Please Don't Bother Them in Iraq."

Q: In Law Review 185 (September 2005) and Law Review 0859 (December 2008), you wrote that USERRA does not apply to Reserve Component chaplains. I am an ordained minister and a chaplain in the Army Reserve, as well as a VA chaplain. Does that present a problem?

A: No. I wrote in Law Reviews 185 and 0859 that because of the First Amendment to the U.S. Constitution, it is impossible to enforce USERRA and other laws against *religious institutions* as employers, especially with regard to *ordained* employees. The VA is not a religious institution. You can enforce your rights against the VA through the Merit Systems Protection Board, a quasi-judicial federal agency, just like any other federal employee with a USERRA claim

If you have questions, suggestions, or comments, please contact Captain Samuel F. Wright, JAGC, USN (Ret.) (Director of the Servicemembers' Law Center) at swright@roa.org or 800-809-9448, ext. 730.